THE TRINITY REVIEW

For though we walk in the flesh, we do not war according to the flesh, for the weapons of our warfare [are] not fleshly but mighty in God for pulling down strongholds, casting down arguments and every high thing that exalts itself against the knowledge of God, bringing every thought into captivity to the obedience of Christ. And they will be ready to punish all disobedience, when your obedience is fulfilled. (*2 Corinthians* 10:3-6)

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Julius and the Roman Prerogative

By Timothy F. Kauffman

Introduction

When Constantine came to power in 306 AD, he inherited a brutal persecution of Christians, an unstable empire on the cusp of civil war, a swelling bureaucracy and an overwhelming judicial caseload of felonies, misdemeanors, municipal disputes and petty disagreements. As chief justice of the empire, that backlog not only distracted him from his imperial duties, but also made justice largely inaccessible to ordinary citizens. Early in his reign, the emperor corrected the problem by establishing a tightly regulated, multi-tiered appellate system including both civil and episcopal courts, in which evidence, testimony, and rulings were meticulously documented and forwarded to the next higher court on appeal.

The change greatly reduced Constantine's workload; it made justice more accessible to the common man, and yet still allowed litigants to appeal adverse rulings all the way up to the imperial palace if necessary. The councils and synods of the time reflect not only the Church's embrace of Constantine's system of appeal, but also Constantine's embrace of the episcopal courts. In the midst of that mutual embrace Bishop Julius of Rome excoriates the plaintiffs in the trial of Athanasius for violating a longstanding custom: "Are you ignorant that *the custom has been for word to be written first to us*, and then for a just decision to be passed from this place?"[1]

The question is pregnant with the rigors of Constantinian judicial reform, but scholars, historians, and apologists have for more than a millennium extracted it from its original context to make it stand alone as a declaration of Roman ecclesiastical and judicial primacy. The Roman Catholic *Newman Ministry*, for example, suggests that Julius' question was "an early instance of the claims of primacy for the Bishop of Rome,"[2] and Roman Catholic convert and apologist, Fr. Ray Ryland, claimed that it proves universal Roman papal authority in the early church.[3] Such fanciful assessments are made in ignorance of the strict regulatory burdens Constantine's judicial reforms imposed on defendants, plaintiffs, and appellate judges — in this case, Athanasius, his accusers, and Bishop Julius of Rome. Julius' question meant nothing at all like what those assessments suggest.

When viewed through the lens of the ongoing early 4th century judicial reform and its literary, conciliar, and ecclesial context, Julius' question is understood as the demand neither of a chief justice nor of an infallible shepherd, but of a frustrated mid-level appellate judge with limited jurisdiction, looming legal deadlines, and tedious administrative obligations. With few options available to him, Julius' precarious situation was

[1] Athanasius, *Apologia Contra Arianos* (*ACA*) Part I, Chapter 2 "Letter of Julius to the Eusebians at Antioch," 35. *Nicene and Post-Nicene Fathers*, Second Series (*NPNF-02)* volume 4, Philip Schaff and Henry Wace, editors, M. Atkinson and Archibald Robertson, translators, Christian Literature Publishing Co., 1892.

[2] "Saint Pope Julius." *Newman Ministry*, www.newmanministry.com/saints/saint-pope-julius.

[3] Ryland, Ray, "Papal Authority and the Early Church," *The Coming Home Network*, 3 February 2015, chnetwork.org/deep-in-history/papal-authority-early-church-fr-ray-ryland/. (14:50-16:08)

exacerbated by an uncooperative plaintiff whose deliberate procedural violations would soon land Julius' own ruling in a higher appellate court, and ultimately elevate it to the imperial palace for final resolution. In truth, the custom "*for word to be written first to us"* is not evidence of Roman primacy, but of Rome's lower standing in Constantine's judicial hierarchy. Julius' litigants would have their day in a higher court, but due process required that they work their way up from below.

Because Athanasius' trial and Julius' question occurred in this specific judicial context, we shall first introduce the reader to Constantine's judicial philosophy and terminology. We shall then provide a brief history of the Church's initially cautious but ultimately enthusiastic embrace of his reform through the Councils of Arles (314 AD), Nicæa (325 AD) and Sardica (343 AD). We will then conclude by revisiting Julius' question and his letter to Athanasius' accusers, examining their meaning in the original context.

Constantine's Judicial Appellate Reform

Early in his reign Constantine appears to have become familiar with the advice Jethro had given to Moses when he faced a similarly overwhelming judicial caseload. Moses' role as chief justice had him hearing and deciding cases "from morning unto even" whenever any of his people "have a matter…between one and another." Such a system burdened him with tedious administrative duties and the people with unreasonably long waiting periods to have their cases heard and decided. "The thing that thou doest is not good," Jethro admonished him. "Thou wilt surely wear away, both thou, and this people that is with thee." To preserve Moses' well-being, to administer justice more effectively, and to make it more easily accessible, Jethro prescribed an appellate system in which lower courts could hear and settle "every small matter," but "every great matter they shall bring unto thee." Moses' judicial reform was implemented successfully and "the hard causes" were brought to Moses, but "every small matter" was required to be heard in a lower court first (*Exodus* 18:13-26).

Appellatio (Appeal)

Constantine's judicial reform followed a similar path by delegating authority to the provincial governors, with similar results. As John Noël Dillon observes in *The Justice of Constantine*, "Promotion of appeal helped Constantine to check the flood of extraordinary *supplicationes* to the imperial court,"[4] just as Jethro's advice had for Moses. Likewise, "[a]ccess to appeal guaranteed the subjects of the empire judicial rulings in conformance with the norms of Roman law,"[5] just as Moses' appellate reform guaranteed decisions in accordance with the "ordinances and laws" of God (*Exodus* 18:20).

These new arrangements reduced Constantine's caseload considerably while improving access to the judicial system through a disciplined and methodical appellate process focused on accuracy and procedural rigor. Because there were harsh penalties both for unruly litigants (they would be "branded with infamy") as well as for unscrupulous judges (they would be "visited with proper punishment"),[6] the system was to some degree self-regulating, even under Constantine's long arm and watchful eye. The provincial rulings were always "subject to challenge," keeping the lower courts honest and obedient to Constantine's judicial regulations.[7] But litigants were also expected to be circumspect in their pleas, because the Emperor's patience was not inexhaustible. He would not suffer "dilatory and frustrative deferments that are not appeals but mockeries."[8]

Constantine's reforms, therefore, had made justice widely accessible, but had also made all participants — judges and litigants — ultimately accountable to him. That accountability manifested in a meticulous process of written recordkeeping consisting of "a dossier in the form of a consultation in which all the pertinent documents are brought by official couriers to the imperial court."[9]

Instructio Plena (Full Documentation)

Under the new system, appellate judges were to compile rulings, *sententiæ,* "after having heard the actions of both parties."[10] All the relevant information — statements from litigants, testimony of witnesses,

[4] Dillon, John Noël, *The Justice of Constantine: Law, Communication, and Control*, University of Michigan Press, 2012, 221

[5] Dillon, 215.

[6] Pharr, Clyde, *The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary and Bibliography,* The Lawbook Exchange, Ltd., 2001, 325. (*Theodosian Code* (*CTh*) 11.30.16)

[7] Dillon, 214.

[8] Pharr, 334; (*CTh* 11.36.1)

[9] Dillon, 218.

[10] Pharr, 322; (*CTh* 11.30.1)

decisions of judges — was to be documented thoroughly. "The *instructio* consisted of several documents, all of which should have been recorded in the official proceedings of the court, the *acta* or *gesta*, by the *officium* of the presiding judge."[11] It was the duty of the presiding judge to ensure that "all records be sent to the imperial court." Full compliance meant that all "documentation be inserted in the proceedings/records."[12]

To represent the interests of litigants, "a thorough interrogation of the parties" was required in the event it was necessary "to refer the case to the emperor" on appeal. Incomplete dossiers were forbidden: "nor may anything be sent to Us that lacks full documentation (*instructio plena*)."[13] In an edict of 321 AD, Constantine provided explicit and detailed instructions on the obligation of the judge to conduct a "full inquiry" that concluded only when he had achieved "the complete satisfaction of the litigants." "By repeated inquiry and by continued interrogation the judge shall demand whether there is any new matter remaining which should be added to the allegations."[14]

Because the system was designed to be both thorough and equitable, the litigants were on notice that the last opportunity to make additional accusations or provide exculpatory evidence was *during the initial trial*. It was forbidden to include any additional complaints or defenses apart from that which was included in the dossier. "No person shall put anything in his petitions in rebuttal which he neglected to assert in the trial," and both parties "must be compelled" to comply, for it was prohibited to add anything that had not been brought initially "before the trial judge."[15] The rules were quite clear. If a litigant did not submit a proper rebuttal within the allotted five day window, the dossier was to be forwarded to the Emperor without it: "For when the five days have elapsed, you must not grant a hearing to a litigant offering petitions in rebuttal, but because such petitions were not offered within the time fixed, you must refer all records to Our Wisdom without them."[16]

Although Constantine's appellate system was generously available to all, there would be no latitude for manipulation, deception, diversionary tactics or willful noncompliance. Everything — *everything* — that had been considered in the lower judge's *sententiam* would be considered on appeal. Nothing less and *absolutely nothing more*. The only purpose of the appeal was to ensure that *the original ruling* had been fair, and to correct it if it had not. The system was not set up for, and would not tolerate, perpetual litigation, unending appeals and ever-expanding charges and defenses.

<u>*Supplicare Causa Pendente* (Pleading a Case Still Pending)</u>

Except in difficult cases, neither the judge nor the litigants were allowed to seek the opinion of, or obtain a ruling from, the Emperor *while a lower court was still hearing a case*. Constantine clearly did not want to hear a dispute until it had worked its way up through the appeals process, complete with *instructio plena* and a written *sententiam*. That, after all, had been the whole point of the reform: to prevent judicial backlogs in his superior court. "It is not permitted to supplicate while a case is pending (*supplicare causa pendente*),"[17] because the appellate system had already safeguarded the right of appeal.

> In view of the fact that there remains to litigants the legitimate choice of an appeal from decision, you must consult Our Majesty only concerning a few matters which cannot be decided by judicial sentence (*sententia*), in order that you may not interrupt our Imperial occupations.[18,19]

Thus, as early as 312 AD, not only judges, but litigants also, were prohibited from communicating with the Emperor, except in extraordinary circumstances. "To supplicate the Emperor during the pendency of a suit is not permitted."[20]

Potentiores (Powerful Persons)

One risk to Constantine's reforms manifested in powerful men, far away from the Imperial Court, who

[11] Dillon, 206.
[12] Dillon, 206.
[13] Dillon, 205.
[14] Pharr, 52; (*CTh* 2.18.1) *c*. 321 AD, emphasis added.
[15] Pharr, 323-24; (*CTh* 11.30.11)
[16] Pharr, 322; (*CTh* 11.30.1)
[17] Dillon, 211; (compare Pharr, 323; (*CTh* 11.30.6) *c*. 316 AD.
[18] Pharr 321; (*CTh* 11.29.1) 312 AD; Dillon, 213.
[19] In legal terms, *consultatio ante sententiam*. "Under the earlier emperors, it had become customary for judges in cases of doubt to consult the emperor before delivering judgment (*consultatio ante sententiam*)." "Constantine prohibited appeals before final judgment" (Mackenzie, *Studies in Roman Law,* 4th Edition, William Blackwood & Sons, 1876, 379, 379n).
[20] Pharr 323; (*CTh* 11.30.6) (326 AD). Exceptions were made only when documentation was withheld from the litigants.

could undermine the process and obstruct justice through undue influence. Such men, called *potentiores*, could easily intimidate the provincial governors.[21] Constantine took extraordinary steps to prevent *potentiores* from corrupting his system of justice by their influence.[22]

So near to Constantine's heart was this matter of *potentiores* that he wrote to his vicar in Italy (325 AD), relieving him of all other duties, except the task of handling cases related to *persona potentior*.[23] Three years later, writing to the Prefect of the City of Rome, Constantine insisted that matters related to "any very powerful and arrogant person" be brought immediately to his attention.[24]

The Ecclesial Embrace of Appellate Reform

The Novelty of Ecclesiastical Appeals

Constantine's appellate reform, though inspired by Moses, was a novelty in the Church. Nevertheless, it was gradually accepted, embraced, and finally canonized by the Councils. This is evident from the complete absence of synodal appeals until his reign. In the earliest synods—from Hierapolis[25] and Anchialus[26] to address Montanism in the second century, the Quartodeciman councils in Palestine, Rome, Pontus, Gaul and Osrhoëne[27] (*c*. 196 AD), the synods in Carthage, Iconium and of Synnada (218 – 235 AD) on the baptism of heretics,[28] the Alexandrian synod against the ordination of Origen (231 AD),[29] the councils in Europe and Africa on the Lapsed (*c*. 253 AD),[30] the synod of Arsinoë (*c*. 255 AD) on the Millenarian error,[31] to the Synods of Antioch against Paul of Samosata (264 – 269 AD)[32]—there is not a single case of appealing one council's or synod's ruling to another. Prior to Constantine, the ancient mode of judicial review was an exchange of opinions between bishops and congregations in person or by correspondence.

When a faction in Corinth unjustly dismissed duly elected presbyters (1st century), no appeal was filed, but the congregation asked Clement of Rome for advice. Clement wrote back recommending that the factious party "do whatever the majority commands."[33] When Spanish bishops, Basilides and Martialis, were deposed by their congregations for blasphemy and idolatry (*c*. 256 AD), no appeal was filed, but Basilides traveled to Rome to ask bishop Stephen to intervene, and the Spanish congregations asked Cyprian of Carthage to weigh in. Cyprian advised them that Stephen was "deceived" and "ignorant," and the decision was entirely in the hands of the congregations: "they themselves have the power either of choosing worthy priests, or of rejecting unworthy ones."[34] When Sabellius was deposed by Dionysius of Alexandria (*c*. 260 AD), no appeal was filed, but "some of the brethren…went up to Rome" to ask Dionysius of Rome to weigh in. Dionysius of Rome responded[†] by writing against the parties of Sabellius and Arius, and then to Dionysius of Alexandria to let him know what had transpired.[35] Even in the deposition of Paul of Samosata (264-66 AD) there was no conciliar appeal of *the ruling*.[*] However, because Paul refused to surrender the

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[21] Dillon, 196.

[22] Dillon 198; compare Pharr, 28; (*CTh* 1.16.14).

[23] Dillon 198; (compare Pharr, 25; (*CTh* 1.15.1).

[24] Pharr, 28; (*CTh* 1.16.4).

[25] Eusebius, *Historia Ecclesiastica (HE)* 5.16.1-22 *NPNF-02* volume 1, Philip Schaff and Henry Wace, editors, Rev. Arthur Cushman McGiffert, Ph.D., translator, Christian Literature Publishing Co., 1890.

[26] Eusebius, *HE* 5.19.1-4.

[27] Eusebius, *HE* 5.23.1-3.

[28] Eusebius, *HE* 6.23-24; Cyprian of Carthage, *Epistle 30*.5, *51*.4. *Ante-Nicene Fathers* (*ANF)* volume 5, Alexander Roberts, James Donaldson, and A. Cleveland Coxe, editors, Christian Literature Publishing Co., 1886.

[29] Photius, *Bibliotheca* Codex 118, *The Library of Photius*. [Translated] by J.H. Freese. Vol. 1, Society for Promoting Christian Knowledge 1920, 208.

[30] Cyprian of Carthage, *Epistle 51*.

[31] Eusebius, *HE* 7.24.1-9.

[32] Eusebius, *HE* 7.30.1-23.

[33] Clement, *to the Corinthians* 54. *Ante-Nicene Fathers* (*ANF)* volume 9, Allan Menzies, editor, Christian Literature Publishing Co., 1896.

[34] Cyprian of Carthage, *Epistle 67*.3,5.

[†] To explain the journey to Rome and Dionysius' letter, historians have invented a Roman synod out of nothing. Schaff claims "Dionysius of Rome…held a council in 262 AD" (Schaff, P. *History of the Christian Church: Volume 2: Anti-Nicene Christianity* (9th ed., Vol. 2), Charles Scribner's Sons, 1910, 581), and Feltoe says "the Bishop of Rome appears to have convened a synod," Feltoe, C. L. Editor, *St. Dionysius of Alexandria Letters and Treatises* (Ser. "Translations of Christian Literature Series I Greek Texts," The Macmillan Company, 1918, 20. There is no evidence of an appeal or a synod to address the matter. The only extant evidence of any response at all is *an exchange of letters* as would be expected in that time period.

[35] Athanasius, *De Sententia Dionysii,* 13.

[*] Eusebius leaves no doubt how Paul was ultimately evicted: the emperor "decided the matter" and Paul "was driven out of the church…by the worldly power," without so much as a hint of

church *building*, and the Church could not exercise the civil power of eviction, the Antiochian church petitioned Emperor Aurelian who "decided the matter most equitably" and evicted him.[36]

Indeed, by Cyprian's account, formal appeals appear to have been completely inconsistent with church polity. Felicissimus and Fortunatus had been excommunicated in Carthage and travelling on to Rome, were refused fellowship there by Cornelius. Cyprian wrote to Rome to affirm Cornelius' hard stance, for there was no just cause to hear an appeal of a sentence already decided by "the authority of the bishops constituted in Africa." Cyprian ruled out appeals altogether: "it has been decreed by all of us — and is equally fair and just — that the case of every one should be heard there *where the crime has been committed*."[37] Under that constraint, appeals to neighboring provinces and dioceses were unthinkable. Thus, for centuries the *very idea of appeal* had not even entered the mind of the Church. That all changed under Constantine.

Episcopalis Audientia (Episcopal Courts)

The success of Constantine's innovation, and the reason the Church eventually embraced it, is that he conscripted bishops to serve as appellate judges in a parallel ecclesial system. Litigants and episcopal judges were expected to abide by the same appellate procedures that governed civil suits. Under that rubric, Christian litigants were allowed to transfer their cases from civil to episcopal courts even without the consent of the opposing party. As early as 318 AD, a civil judge was required by law to honor the request "if any person should desire him to transfer his case to the jurisdiction of the Christian law," the ruling of which court "shall be held as sacred."[38] By 333 AD, "if such litigant should choose the court of a bishop," both parties were to be "dispatched to the bishop," even if "the other party to the suit should oppose it."[39] Three fourth century councils — Arles (314 AD), Nicæa (325 AD) and Sardica (343 AD) — occurred during this remarkable period, revealing just how transformative this innovation was, as the Church initially resisted, then embraced and finally canonized Constantine's reforms.

Council of Arles (314 AD)

When bishop Secundus of Tigisis presided over the Synod of Cirta (305 AD), the seventy bishops with him confessed that they had betrayed the faith during the brutal Diocletianic persecution. Secundus "pardoned them," Augustine wrote,[40] and according to Optatus, any further judgment was left in the hands of God.[41] In a brash act of hypocrisy, those same bishops[42] then condemned Felix of Aptunga on the same charges, thinking thereby to depose Cæcilianus of Carthage, whom Felix had ordained. In Cæcilianus' place they ordained Majorinus (311 AD), and then petitioned Constantine to resolve the resulting schism in which two men claimed to be the bishop of Carthage.

The appeal was first heard in Rome under Bishop Melchiades in 313 AD with 18 other bishops, and Cæcilianus was exonerated.[43] Not satisfied with the

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synodal intervention (Eusebius, *HE* 7.30.19). Yet out of whole cloth, historians have woven a fanciful historical fiction, averring that Aurelian convened a synod in Rome to make a final decision on the matter. McGiffert, for example, has Emperor Aurelian "ordering the building to be given to those to whom the bishops of Italy and of the city of Rome *should adjudge it*" (*NPNF-02* volume 1). The original Greek suggests nothing of the sort, saying rather, "τοῦ δόγματος ἐπιστέλλοιεν" (Jacques-Paul Migne, *Patrologiæ Cursus Completus, Series Græca* (*PG*), volume 20 (Imprimerie Catholique, Paris, 1857) 720). In other words, Aurelian wanted the church building given to whichever party was in dogmatic agreement with the bishops of Italy and Rome *"by exchange of letters."* His rationale is no mystery. At the time of Paul of Samosata's episcopate in Antioch, the separatist queen Zenobia of Palmyra ruled in Syria and Egypt and was at war with Aurelian. Paul of Samosata had been on friendly terms with Zenobia, and she in turn wished to protect his standing (Athanasius, *Historia Arianorum (HA)*, 8.71). Emperor Aurelian had only one objective: to remove the influence of Zenobia in Syria and Egypt where she had only recently declared herself empress. He sent her bound to Rome (*Historiae Augustae*, Vita Aureliani 2.33), and decided that the church building should belong to whichever bishops in Antioch were of the same religion as the bishops in Italy and Rome. It was a political decision, not a religious one, and neither the churches of Italy nor the church of Rome were involved in his decision making.

[36] Eusebius, *HE* 7.30.19.

[37] Cyprian of Carthage, *Epistle 54*.14, emphasis added.

[38] Pharr 31; (*CTh* 1.27.1).

[39] Pharr 477 (*Sirmondian Constitution* 1).

[40] Augustine, *Letter 43*.17. *Nicene and Post-Nicene Fathers*, First Series (*NPNF-01)* volume 1, Philip Schaff, editor, J.G. Pilkington and J.G. Cunningham, translators, Christian Literature Publishing Co., 1886.

[41] Optatus, *Against the Donatists* I.14. *The Work of St. Optatus Against the Donatists (OAD)*, O. R. Vassal-Phillips, translator, Longmans, Green & Co. 1917, 27-29.

[42] Augustine, *Epistle 43*.14; Optatus, *Against the Donatists* I.19 *OAD*, 34-37.

[43] Optatus, *Against the Donatists* I.23-24 *OAD*, 44-49.

outcome, the Donatists appealed again to Constantine who summoned 34 bishops[44] to Arles (314 AD) where Cæcilianus was exonerated again. As a last resort the Donatists appealed directly to Constantine, asking him to hear the case himself, whereupon Cæcilianus was again exonerated by the Imperial Court.[45] At the same time, Constantine had the matter of Felix of Aptunga prosecuted in a civil court, and "after a most thorough investigation," he too was exonerated.[46]

The history of the Donatist controversy is of interest to us because the dispute (305 AD) originated before Constantine took power (306 AD) but came to its final resolution (316 AD) under his new system of appeals. The period therefore provides a glimpse into the Church's original ignorance of and resistance to the reformed judiciary, followed by an accommodation of and ultimate embrace of the reforms.

In their histories of the Donatist controversy, Augustine and Optatus provide circumstantial and documentary evidence of the Church's gradual acceptance of the reforms. Both Augustine and Optatus are aghast that Cæcilianus' judges at Cirta had been under the influence of a *potentiore*, "a very wealthy woman, whom [Cæcilianus] had offended when he was a deacon."[47] In his analysis, Augustine argues not only from the court documents, referring both to the civil appellate record ("*Gesta proconsularia*") and the ecclesiastical appellate record ("*Gesta ecclesiastica*"),[48] but also from "the letters of the Emperor Constantine, in which the evidence of all these things was established beyond all possibility of dispute."[49] Oblique references are made throughout to Constantine's demands for thoroughness and accuracy — "See with what scrupulous care for the preservation or restoration of peace and unity everything was discussed" —contrasted with the negligence of the plaintiffs who had condemned Cæcilianus "without any documentary evidence or examination as to the truth."[50] We see passing references to the obligations of an appellate judge — "having examined the matter with the diligence, caution, and prudence which his letters on the subject indicate, he pronounced Cæcilianus perfectly innocent"[51] — as well as the prohibition against considering undocumented evidence — "We cannot tell, since the evidence is not stated in the public Acts."[52]

Of particular interest to us is Augustine's confusion about the judicial context in which the controversy unfolded. At Cirta in 305 AD, an appeals process had not been established. At the ordination of Majorinus in 311 AD, the appellate system was in place, but *Episcopalis Audientia* had not yet been codified under Roman Law. Unaware of that prevailing *status quo*, Augustine was baffled at Secundus' failure in 305 AD to "refer their case wholly to the judgment of other bishops,"[53] and assumed that in 311 AD the Donatists had requested an *episcopal* trial. Augustine's recounting of these events is severely anachronistic, but uniquely revealing for its errors.

In truth, Secundus would not have advanced a synodal appeal, for Constantine had not yet even ascended. What is more, the Donatist's first letter to Constantine, far from petitioning for an *episcopal trial*, had actually requested a *civil trial* administered *by civil judges* from Gaul because its *civil administrators* were largely untainted by the antichristian fervor that had recently predominated in the east.[54] They made their second appeal through the proconsul of Africa, requesting that he forward the sealed dossier of *Majorinus v. Cæcilianus* directly to the Imperial Court.[55] These were requests for *civil* hearings by *civil* judges. With his own judicial ethos still in formulation, Constantine granted the request for "judges from Gaul," but opted for an episcopal court, assembling in Rome "three Bishops from Gaul and fifteen others, who were Italians."[56] Misunderstanding that decision, Augustine initially assumed that the Donatist party had

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[44] *Corpus Christianorum*, *Series Latina* CXLVIII, Concilia Galliae a.314-a.506, Charles Munier, editor, Typographi Brepols editores pontificii, 1963, 4.

[45] Augustine, *Letter 43*.4.

[46] Augustine, *Letter 43*.4-5; 88.4. Optatus, *Against the Donatists* I.27 *OAD*, 53-55.

[47] Augustine, *Letter 43*.17; compare Optatus, *Against the Donatists* I.16 *OAD*, 31.

[48] Augustine, *Letter 43*.5; Jacques-Paul Migne, *Patrologiæ Cursus Completus, Series Latina* (*PL*), volume 33 (Imprimerie Catholique, Paris, 1845, 162.

[49] Augustine, *Letter 43*.5.

[50] Augustine, *Letter 43*.14.

[51] Augustine, *Letter 43*.20.

[52] Augustine, *Letter 43*.12.

[53] Augustine, *Letter 43*.7.

[54] Optatus, *Against the Donatists*, I.22 *OAD*, 43: "since…thy father (unlike other Emperors) did not persecute Christians, and Gaul is free from this wickedness, we beseech thee that thy piety may command that we be granted judges from Gaul."

[55] Augustine, *Letter 88*.1-2.

[56] Optatus, *Against the Donatists* I.23 *OAD*, 45.

asked Constantine "to appoint *bishops* to act as judges,"[57] something they most certainly had not.[§]

Invalid though they may be, Augustine's inferences evince a widespread ecclesiastical embrace of *Episcopalis Audientia* at the time of his letter in 397 AD, nearly a century removed from the Synod of Cirta. From his late-fourth century viewpoint, only negligence on the part of Secundus could account for his failure to forward the case to a higher court in 305 AD, and only a Donatist request for episcopal judges in 311 AD could account for Constantine summoning Gallic bishops to Rome. Neither assumption was valid, but by 397 AD, *Episcopalis Audientia* was so widely embraced that Augustine could not imagine a time when it was not.

We are thus able to look back in time to a period in Church history when an appellate system did not exist, to watch the Donatist controversy unfold as the Church becomes familiar with Constantine's reforms, and to read the historical accounts of the subsequent decades when those reforms were enthusiastically embraced. Just as important, Optatus and Augustine describe the meticulous administrative duties of appellate judges, both civil and episcopal, the obligatory burden of the litigants to cooperate fully with them in discovery, and the earnest belief of litigants and judges that an appeal was not only allowed but expected.

Council of Nicæa (325 AD)

While the Diocletianic persecution was still raging, Meletius of Lycopolis "was convicted of many crimes" and excommunicated by Peter of Alexandria at a council in 306 AD. Nevertheless, he continued stirring up discord for many years afterward, and "[w]hile Meletius was thus employed, the Arian heresy also had arisen."[58] When Peter's successor, Alexander, first began to cross swords with Arius in 324 AD, Constantine attempted "to extinguish the conflagration" and implored them to be reconciled.[59]

Constantine's overture failed, "for neither was Alexander nor Arius softened" by it.[60] Because there continued to be "incessant strife and tumult among the people," Emperor Constantine "convoked a General Council, summoning all the bishops by letter to meet him at Nicæa in Bithynia."[61] The Council considered both pressing issues: the episcopal dispute regarding Meletius and the Arian heresy that Alexander had raised to the Emperor's attention.

The history of the council of Nicæa is relevant here not only because the root of discord was planted before Constantine took power, but also because the resolution occurred under the rubric of his judicial reforms. The significance of the controversy to church polity is reflected in the synodal letter and canons (325 AD), in Bishop Julius' reflections on the 5th Canon of Nicæa (340 AD), and in Athanasius' written recollections of the controversy decades later (360s AD). As with Arles, Nicæa also provides a view of the Church's gradual embrace of Constantine's judicial reforms, none of which were in place when Meletius was deposed in 306 AD.

The bishops of Nicæa reluctantly reduced Meletius' sentence[62] and tacitly acknowledged in Canon 5 that the schism could have been avoided through an orderly appellate system. Having witnessed the unduly harsh penalty imposed on Meletius by Peter, the miscarriage of justice suffered by Cæcilianus under Secundus, and the extraordinary measures the Emperor took to overturn Cæcilianus' conviction, the Nicæan divines canonized Constantine's reforms in Canon 5. While recognizing the validity of episcopal sentences (consistent with Constantine's constitution on episcopal courts in 318 AD), the Council also recognized the right to appeal those sentences (consistent with his constitution on appeals in 312 AD).

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[57] Augustine, *Letter 43*.4 (emphasis added) (397 AD); compare *Letter 53*.5 (400 AD), *Letter 76*.2 (402 AD).

[§] Augustine's early writings up to 406 AD consistently have the Donatists requesting an episcopal trial. He eventually revised his account, consistently reporting thereafter that the Donatists had indeed requested a civil trial. See *Letter 88*.1 (406 AD), *89*.3 (406 AD), *93*.13 (408 AD), *185*.6 (416 AD) and esp. *Letter 105*.8 (409 AD) where Augustine says the Donatists "referred the case of Cæcilian to the emperor," but the emperor instead "delegated it to other bishops." (*The Works of Saint Augustine: A translation for the 21st Century*, Part 2 Letters, Volume 2 Letters 100 - 155, Roland Teske, S.J., translator, New City Press, 2003, 58).

[58] Athanasius, *ACA*, Part II, Chapter 5, 59.

[59] Socrates Scholasticus, *Historia Ecclesiastica (HE)*, Book I, Chapter 7 *NPNF-02* volume 2, Philip Schaff and Henry Wace, editors, A.C. Zenos, translator, Christian Literature Publishing Co., 1890.

[60] Socrates Scholasticus, *HE*, Book I, Chapter 8.

[61] Socrates Scholasticus, *HE*, Book I, Chapter 8.

[62] *Council of Nicæa*, "Synodal Letter to the Church of Alexandria". *NPNF-02* volume 14, Philip Schaff and Henry Wace, editors, Henry Percival, translator, Christian Literature Publishing Co., 1900, 53.

The wording of Canon 5 reflects both judicial principles:

> Concerning those, whether of the clergy or of the laity, who have been excommunicated in the several provinces, let the provision (*sententia*) of the canon be observed by the bishops which provides that persons cast out by some be not readmitted by others. Nevertheless, inquiry should be made whether they have been excommunicated through captiousness, or contentiousness, or any such like ungracious disposition in the bishop. And, that this matter may have due investigation, it is decreed that in every province synods shall be held twice a year, in order that when all the bishops of the province are assembled together, such questions may by them be thoroughly examined, that so those who have confessedly offended against their bishop, may be seen by all to be for just cause excommunicated, until it shall seem fit to a general meeting of the bishops to pronounce a milder sentence (*sententiam*) upon them.[63]

Certainly, the excommunication of Meletius and the deposition of Cæcilianus are in view here, as both men were recent victims of the "captiousness, or contentiousness, or…ungracious disposition in the bishop" — Secundus in the case of Cæcilianus, and Peter in the case of Meletius. This is precisely why such *sententiæ* were guaranteed a speedy and impartial appeal under Constantine's reforms, and why the episcopal courts had been conscripted to handle them. The purpose of canonizing appellate review in the 5th of Nicæa, so Julius insisted, was to ensure that the *sententia* against the plaintiff was "not dictated by the enmity of their former judges."[64] While episcopal courts were authorized to issue judicial rulings, the right to appeal for "a milder sentence" was always to be left open to the litigant after the evidence has been "thoroughly examined." We therefore see in Canon 5 early codification of Constantine's judicial reforms, especially his desire for a thorough review of the evidence and the verdict to ensure a just sentence.

The precepts documented in the 5th of Nicæa therefore cannot be understood as ecclesiastical canons handed down from the Apostles. Rather, they are foundational constructs of Constantinian appellate reform recognized and adopted by the Church. Julius of Rome acknowledged as much in his letter to the Eusebian party. The merits of an orderly system of appeals had "obtained in the Church" at some point prior to Nicæa, for it was "of ancient standing," but it was only in the 5th of Nicæa that it was "noticed and recommended" as an ecclesiastical norm.[65] Canon 5 therefore describes not an Apostolic precept, but a practical and judicious civil process imported into the administrative functions of the Church.

For this reason, Athanasius' resentment toward Meletius is of particular interest to us. He observes (*c.* 360 AD) that Meletius "was convicted of many crimes," and "did not appeal to another council…but made a schism" instead.[66] In truth, neither would Meletius have initiated such an appeal, nor had the Church even established procedures for it. Athanasius' anachronism is nevertheless of some value to us because it provides implicit evidence of a widespread embrace of *Episcopalis Audientia* by the 360s AD, six decades removed from the deposition of Meletius, and four from Nicæa. From Athanasius' late fourth century viewpoint, *Episcopalis Audientia* and the appeals process were so widely embraced that he could not imagine why Meletius had not availed himself of them.

From Nicæa's Canons, Julius's letter and Athanasius' histories, we are therefore able to peer back into the annals of Church history, beginning at a time when the appellate system did not exist, and watch as Constantine's reforms are codified into canon law, and then fully and finally embraced by the Church.

This article will conclude in the next Trinity Review.

[63] *Council of Nicæa*, Canon 5. *NPNF-02* volume 14, Philip Schaff and Henry Wace, editors, Henry Percival, translator, Christian Literature Publishing Co., 1900, 13; Migne *PL* 67, 40.

[64] Athanasius, *ACA*, Part I, Chapter 2 "Letter of Julius to the Eusebians at Antioch," 22.

[65] Athanasius, *ACA*, Part I, Chapter 2 "Letter of Julius to the Eusebians at Antioch," 22.

[66] Athanasius, *ACA*, Part II, Chapter 5, 59.